

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES)	
)	
)	
v.)	Criminal No. 97-39-B
)	
MICHAEL R. STRICKLAND,)	
)	
Defendant)	

**RECOMMENDED DECISION TO DENY DEFENDANT’S MOTION FOR
COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255**

Petitioner, Michael Strickland, moves to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. On July 23, 1997, Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2). Petitioner was sentenced to thirty-two months in prison, two years of supervised release and a \$100 felony assessment. Petitioner filed no direct appeal. Petitioner now seeks collateral relief claiming that he was denied effective assistance of counsel under the Sixth Amendment of the United States Constitution.

Background

On May 20, 1997 a federal grand jury indicted and charged Petitioner for the following criminal violations: possession of firearm by a felon in violation of 18 U.S.C. §§922 (g)(1) and 924 (a)(2) (Count I) ; possession of a schedule II controlled substance (methamphetamine) (Count II) , and possession of a schedule I substance

(marijuana) (Count III). Petitioner entered a guilty plea on Count I of the indictment on July 23, 1997.

Petitioner now claims that he was rendered ineffective assistance of counsel, which caused Petitioner to be “induced” into pleading guilty. Petitioner also argues that counsel rendered him ineffective assistance by failing to secure Petitioner a more favorable plea agreement. For the reasons set forth below the Court recommends that Petitioner’s motion be DENIED.

Analysis

A. Adequacy of Petitioner’s §2255 Motion and Attached Memorandum

Petitioner has filed an unsigned motion together with an unsworn memorandum entitled “Explanation of Additional Grounds and Facts Supporting Petitioner’s 2255 Motion”. As the Government properly points out, the First Circuit has made clear that, “A habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or supporting affidavits. Facts alluded to in an unsworn memorandum will not suffice.” *United States v. Labonte*, 70 F.3d 1396, 1413 (1st Cir. 1995) (citations omitted). Recognizing his error, Petitioner filed a motion to amend and resubmitted the last page of the form petition signed under oath.

The Court GRANTS Petitioner’s motion to amend and is satisfied that the submission of the page properly presents the entire motion under oath. However, that

oath does not extend to the facts asserted in the attached memorandum. But, as explained below, the Court is satisfied that even if the facts in the memorandum were properly sworn to, Petitioner's motion would still be denied.

B. Ineffective Assistance of Counsel

i. General standard

The grounds cited by Petitioner include: Counsel's failure to reduce to writing all matters relevant to the agreement, Counsel's failure to investigate the facts leading to Petitioner's arrest, Counsel's failure to advise Petitioner to check himself into a drug rehabilitation center prior to sentencing, and Counsel's failure to know the applicable law.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. Petitioner must also show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The Supreme Court later applied the same analysis to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockart*, 474 U.S. 52 (1985). Under the principles laid down in *Lockart*, a court must examine whether counsel's performance was deficient and whether a reasonable probability exists that but for counsel's errors, the petitioner would not have pled guilty.

As stated above, although the Petitioner states in his memorandum that he is guilty and does not want to withdraw his plea, he also states that he was induced into signing his plea agreement by the omission of certain "items" that he believed would be contained in the plea agreement. Petitioner claims counsel rendered ineffective assistance by failing to reduce the "items" orally agreed to into writing. In essence, Petitioner claims that he did not intend to enter the plea agreement he signed.

Especially relevant to whether a petitioner voluntarily agreed to enter into the plea agreement is the Rule 11 proceeding. *Panzardi-Alvarez v. United States*, 879 F.2d 975, 982 (1st Cir. 1989). The statements made by a defendant in the proceeding are presumed true and may only be departed from when the defendant presents

credible reasons why the court should now accept defendant's contradictory statements. *Quellette v. United States*, 862 F.2d 371, 375 (1st Cir. 1988).

After reviewing the transcript of the plea hearing and Petitioner's accompanying memorandum, the Court is satisfied that Petitioner does not allege credible reasons why his statements in the Rule 11 proceeding should now be deemed untrue. In the proceeding the following exchange occurred between the judge and Petitioner:

THE COURT: I, also, have before me a written plea agreement that I take it you've had an opportunity to review and sign, Mr. Strickland; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions at all about the contents of the plea agreement?

THE DEFENDANT: No, sir.

(Tr. p. 9-10)

Petitioner's present claim that counsel failed to include certain "items" agreed to orally in the agreement directly conflicts with his statement at the hearing that he read the agreement and had no questions regarding the contents of that agreement. If Petitioner had questions regarding certain "items" that were missing from the plea agreement he should have raised those questions with the Court. For the foregoing reasons, the Court will not grant Petitioner an evidentiary hearing on this claim.

Petitioner's other ineffective assistance of counsel claims pertain to whether counsel should have obtained for him a more favorable plea agreement. Petitioner claims that he would have received a more favorable plea had counsel: properly investigated the facts surrounding the charges against the Petitioner, spent more time on the matter, advised Petitioner to seek drug counseling prior to sentencing, and been more knowledgeable of the law applicable in this matter.

i. Counsel's failure to investigate and spend additional time on the matter

Petitioner claims that counsel never spent enough time on the matter to properly investigate the charges made against him. Specifically, Petitioner claims that counsel spent a total of only two hours with Petitioner in the hallways of the federal building. It is understood that an ineffective assistance claim may be supported by counsel's failure to investigate. *Strickland*, at 690. However, the amount of time spent on a claim does not necessarily indicate that counsel provided ineffective assistance of counsel. *United States v. Raineri*, 42 F.3d 36, 44 (1st Cir. 1994). In *Raineri*, the court stated that although the amount of time spent on a matter may be relevant, it cannot support an ineffective assistance claim by itself without the petitioner providing additional information delineating how counsel spending additional time on the matter would have ultimately changed the plea agreement. *Id.*

In this matter Petitioner has failed to set forth how spending additional time with counsel would have changed the plea agreement. To fulfill the second prong of *Strickland* it is Petitioner's burden to demonstrate what information counsel failed to discover by not investigating the facts surrounding the charge in more detail. This Petitioner has failed to do.

ii. Pre-sentence Rehabilitation

Petitioner next argues that counsel failed to tell him to enter a rehabilitation program before sentencing. Petitioner is convinced he would have received a reduced sentence had he been enrolled in a rehabilitation program at the time of sentencing. Even assuming that counsel should have advised Petitioner to join a drug rehabilitation program prior to sentencing, it is by no means certain that Petitioner would have received a further reduction from the one he received by heeding counsel's advice and entering into an early plea agreement.

The guidelines for sentencing merge rehabilitation efforts with acceptance for responsibility deductions. In fact, it would only be an "occasional instance" when a defendant receives an additional reduction due to rehabilitation efforts above the reduction for acceptance of responsibility. *United States v. Sklar*, 920 F.2d 107, 117 (1st Cir. 1990). Whether to apply an additional deduction is within the sentencing judge's discretion. Here, Petitioner has not offered any facts to support his assertion

that the sentencing judge would have reduced his sentence if he had entered into a drug rehabilitation program prior to sentencing.

iii. Counsel's failure to understand the applicable law

Petitioner argues that counsel failed to know the applicable law in this matter. Specifically, Petitioner maintains that counsel rendered ineffective assistance by failing to cite *United States v. Soto*, 132 F.3d 56 (D.C. Cir. 1997) and *United States v. Koon*, 518 U.S. 81 (1996). After reviewing the *Soto* decision, the Court agrees with the Government that it is inapplicable to this matter. In *Soto*, the Court addressed whether the least culpable member in a criminal operation may receive a downward adjustment at sentencing because of his minimal involvement in the enterprise. Here, Petitioner acted alone thereby making the decision in *Soto* inapplicable in this matter.

Petitioner also claims that counsel failed to demonstrate knowledge of the Supreme Court's decision in *Koon*.¹ In *Koon*, the Supreme Court discussed under what circumstances a sentencing court may depart from the Sentencing Guidelines. Even assuming that the principles in *Koon* are applicable in this matter, Petitioner fails to explain how counsel's citation to *Koon* would have resulted in Petitioner receiving a downward departure in his sentence. Additionally, there is no indication

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from the record or Petitioner that the Court sentenced Petitioner in a manner that contradicted any of the principles laid down in *Koon*.

iv. Post-Conviction Rehabilitation

Petitioner next contends that his sentence should be reduced because of the post-conviction rehabilitation he has undergone. Even assuming that this claim is cognizable under a § 2255 motion, Petitioner has not demonstrated that he has undergone rehabilitation to an exceptional degree to warrant a reduction in his sentence.² In *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998), the Court held that the post-conviction rehabilitation required for a reduction in sentence must be atypical and exceptional. That Petitioner has entered into a rehabilitation program is admirable, however it does not rise to a level to warrant a reduction in his sentence.³ Accordingly, I recommend that the Court refuse to grant Petitioner an evidentiary hearing on this ground.

² The First Circuit has not addressed whether a petitioner can seek a reduction in sentence based on post-conviction rehabilitation.

³ The court could not find any case that defines what “exceptional” or “atypical” post-conviction rehabilitation. Those cases that have reduced the sentence include, *United States v. McBroom*, 991 F. Supp. 445, 450-1 (D. N.J. 1998), where petitioner attended AA meetings, remained sober for over four years, and held a steady job for nearly a year; and *United States v. Green*, 152 F.3d 1202,1208 (9th Cir. 1998), where the petitioner volunteered beyond the required 1500 hours of community service required, and started an additional volunteer program.

Conclusion

For the reasons delineated above, I recommend that the Court DENY
Petitioner's motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.